



ILLINOIS COMMERCE COMMISSION

Office of General Counsel

April 4, 1997

William F. Caton
Acting Secretary
Federal Communications Commission
Washington D.C. 20554

Re: CC. Docket No. 96-98

Dear Mr. Caton:

Enclosed please find an original and one copy of the Ex Parte Comments Of The Illinois Commerce Commission Regarding The Petitions For Reconsideration Filed By The Public Utilities Commissions Of Ohio And Texas. This letter will also serve as a memorandum disclosing an oral ex parte presentation which occurred on February 24, 1997. Karl McDermott, Charles Fisher, Charlotte TerKeurst and I, on behalf of the Illinois Commerce Commission, met with Lisa Gelb, Richard Welsh, Susan Reault and Robert Tanner of the Federal Communications Commission. During the presentation we discussed the same issues and arguments contained in the written ex parte comments identified above.

Please acknowledge receipt by date-stamping and returning the enclosed duplicate copy of this letter in the envelope provided.

Sincerely,

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Encls.

cc: International Transcription Service
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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|--------------------------------|---|---------------------|
| In the Matter of |) | |
| |) | |
| Implementation of the Local |) | CC Docket No. 96-98 |
| Competition Provisions in the |) | |
| Telecommunications Act of 1996 |) | |

**EX PARTE COMMENTS OF THE ILLINOIS COMMERCE COMMISSION
REGARDING THE PETITIONS FOR RECONSIDERATION FILED
BY THE PUBLIC UTILITIES COMMISSIONS OF OHIO AND TEXAS**

The Illinois Commerce Commission ("ICC") respectfully submits these ex parte comments in connection with the reconsideration proceedings in the above-captioned docket. The Public Utilities Commission of Ohio ("PUCO") filed a Petition For Reconsideration And Clarification ("PUCO Petition") with the Federal Communications Commission (the "Commission") seeking reconsideration of a number of conclusions reached by the Commission in its First Report And Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (FCC 96-325), CC Docket Nos. 96-98 & 95-185, (released August 8, 1996) ("First Report and Order"). The Public Utility Commission of Texas ("Texas PUC") similarly filed a Petition For Reconsideration ("Texas PUC Petition"). These comments are limited to the requests by the PUCO and the Texas PUC for the Commission to reconsider its conclusion regarding the ability of states to impose additional obligations on non-incumbent local exchange carriers. PUCO Petition, pp. 3-6; Texas PUC Petition, pp. 13-17; First Report And Order, ¶¶ 1241-1248. As explained below, the ICC agrees with the PUCO and the Texas PUC that the Commission's blanket determination that it would be

inappropriate for a state to impose certain additional obligations on non-incumbent local exchange carriers was erroneous.

RELEVANT PROVISIONS OF THE 1996 ACT

The Telecommunications Act of 1996 became law on February 8, 1996. Pub. L. No. 104-104, 110 Stat. 56, *to be codified at* 47 U.S.C. §§ 151 *et. seq.* (the "1996 Act" or "Act").¹ As this Commission has recognized, one of the three principal goals established by the telephony provisions of the 1996 Act was the opening of local exchange and exchange access markets to competition. First Report And Order, ¶ 3. To achieve that goal, Congress removed certain impediments to competition by imposing various pro-competitive obligations on telecommunications service providers. Those duties are set forth in sections 251(a), 251(b) and 251(c) of the 1996 Act, and apply -- respectively -- to telecommunications carriers, local exchange carriers ("LECs") and incumbent local exchange carriers ("ILECs"). 47 U.S.C. §§ 251(a), 251(b) and 251(c). "Telecommunications carriers" represent the complete set of telecommunications service providers subject to section 251 duties, with LECs being a subset of telecommunications carriers, and ILECs being a subset of LECs. There is no question that section 251(a) imposes certain general duties on all telecommunications carriers; that section 251(b) imposes certain

¹ Hereinafter, all citations to the 1996 Act will be to the 1996 Act as codified in the United States Code, unless otherwise indicated.

obligations on LECs which are in addition to those set forth in section 251(a); and that section 251(c) imposes certain obligations on ILECs which are in addition to those set forth in sections 251(a) and (b).

The duties imposed on ILECs by section 251(c) can generally be summarized as follows:

- (1) the duty to negotiate agreements in good faith;
- (2) the duty to provide for interconnection at any technically feasible point, equal in quality to interconnection provided to itself, an affiliate, or anyone else, on terms and conditions that are just, reasonable and nondiscriminatory;
- (3) the duty to provide nondiscriminatory access to unbundled network elements on rates, terms, and conditions that are just, reasonable, and nondiscriminatory;
- (4) the duty to offer for resale, at wholesale rates, any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service;
- (5) the duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services; and
- (6) the duty to provide physical or virtual collocation, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

See 47 U.S.C. §251(c). Although the duties to negotiate in good faith, to unbundle network elements, and to provide for collocation appear for the first time in section 251(c), the duties to interconnect, to resell retail services at wholesale rates, and to provide notice of network changes all appear to be extensions of duties imposed on LECs and/or all telecommunications carriers under

sections 251(a) and 251(b). Compare 47 U.S.C. §§ 251(a), 251(b) and 251(c).

Thus, sections 251(a), 251(b) and 251(c) contain some duties which are similar or overlap. While section 251(a)(1) imposes a general duty on all telecommunications carriers to interconnect directly or indirectly with the facilities and equipment of other carriers, section 251(c)(2) imposes an obligation on ILECs to interconnect at any technically feasible point, at a certain quality level, and on terms and conditions that are just, reasonable and nondiscriminatory. While all LECs have a duty under section 251(b)(1) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of their telecommunications services, ILECs have a duty under section 251(c)(4) to offer their retail services for resale at wholesale rates. While all carriers have a duty under section 251(a)(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to sections 255 or 256, ILECs have a duty under section 251(c)(5) to provide notice of network changes.

With respect to incumbent LECs it should also be noted that section 251(h)(2) provides as follows with respect to the treatment of LECs as ILECs under the 1996 Act:

(2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS-
The Commission may, by rule, provide for the treatment of
a local exchange carrier (or class or category thereof)

as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

47 U.S.C. § 251(h) (2) .

In establishing the pro-competitive obligations set forth in sections 251(a), 251(b) and 251(c), Congress specifically recognized and preserved the right of States and State commissions to promulgate and implement laws, orders and policies regarding the access and interconnection obligations of local exchange carriers. For instance, section 251(d) (3) provides as follows:

(3) PRESERVATION OF STATE ACCESS REGULATIONS- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. §251(d) (3). Similarly, section 261(b) provides that nothing in Part I (47 U.S.C. §§251-261) shall be construed to

prohibit a State commission from enforcing or prescribing regulations if such regulations are not inconsistent with the provisions of Part I; and section 261(c) provides that nothing in Part I "precludes a State from imposing requirements on telecommunications carriers for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part." 47 U.S.C. §§ 261(b), 261(c).

DEFICIENCIES IN THE COMMISSION'S ANALYSIS

This Commission concluded that "allowing states to impose on non-incumbent LECs obligations that the 1996 Act designates as 'Additional Obligations on Incumbent Local Exchange Carriers,' distinct from obligations on all LECs, would be inconsistent with the statute." First Report And Order, ¶ 1247 (footnotes omitted). While acknowledging the assertion by several parties that certain provisions of the Act allow states to impose "additional obligations," the Commission attempted to downplay Congress's preservation of States' rights by stating that such additional obligations must be consistent with the language and purposes of the 1996 Act. *Id.* The Commission then pointed out that the 1996 Act contemplates that new entrants will be subject to the same duties imposed on ILECs when a LEC meets the requirements set forth in section 251(h)(2) for treating a LEC as an ILEC. First Report

And Order, ¶ 1248. The balance of this Commission's analysis went to how it would treat and respond to requests under section 251(h)(2). Id.

The ICC respectfully submits that the Commission's analysis of this very critical issue is faulty and, at a minimum, should be clarified. As the PUCO points out, there is no indication in the 1996 Act that Congress intended to supersede State regulation of local telecommunications service. See PUCO Petition, pp. 3-4. Thus, States should continue to have the option of imposing obligations on non-incumbent LECs which further the Act's goals of competition notwithstanding the fact that such obligations may be similar to or fall within some of the duties specified for ILECs in section 251(c). As noted above, section 251(d)(3) and other provisions of the Act explicitly permit States to impose additional obligations on local exchange carriers which are (1) consistent with the requirements of section 251 and (2) which do not substantially prevent implementation of the requirements of section 251 and the purposes of Part I. 47 U.S.C. §251(d)(3); PUCO Petition, p. 4.

The Telecommunications Act of 1996 begins by stating that it was designed:

[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

1996 Act, Pub. L. No. 104-104, 110 Stat. 56. The Conference Report similarly notes that the Act provides:

for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition

H. Rep. No. 104-458, 104th Cong., 2nd Sess., p. 113 (1996). This Commission's blanket determination that States may not impose any section 251(c) obligations on non-incumbent LECs is contrary to and undermines the goal of the Act to bring new and advanced technologies to all Americans. See PUCO Petition, pp. 4-6.

Congress clearly intended to encourage the development of new telecommunications and information technologies, and furthered that goal by opening up the local market to competition. In this environment, the non-incumbent competitive LECs ("CLECs") will begin to deploy their own facilities and will obviously play a significant role in the deployment of advanced telecommunications and information technologies. Depriving States of the option to impose obligations on CLECs which fall under section 251(c) will stifle Congress' intent to encourage the rapid deployment of advanced telecommunications and information technologies to all Americans. For example, a CLEC may deploy advanced telecommunications technologies which can only be provided by other carriers through collocation with the CLEC's facilities or access to the CLEC's unbundled network elements. The availability of such technologies will be reduced by the Commission's blanket

prohibition of a States' option to impose obligations on CLECs to provide collocation or access to unbundled network elements.

The option to treat CLECs as ILECs under section 251(h)(2) does not resolve this concern. Section 251(h)(2) applies if the CLEC "occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by" the ILEC, and "[the CLEC] has substantially replaced [the ILEC]." 47 U.S.C. §251(h)(2). The deployment of advanced telecommunications and information technologies by CLECs may occur long before a CLEC substantially replaces the ILEC and occupies a position in the market comparable to the position occupied by the ILEC. This Commission's decision to shield non-incumbent LECs from section 251(c) type obligations -- no matter what the circumstances -- will also encourage ILECs to deploy advanced telecommunications and information technologies through non-incumbent LEC affiliates so as not to place themselves at a real or perceived competitive disadvantage. Such a result is clearly inconsistent with Congress' goal to facilitate the rapid deployment of advanced telecommunications and information technologies to all Americans.

This Commission's ruling is also inconsistent with the general pro-competitive intent of Congress. The ICC agrees with the Commission that "[r]ather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition." First Report And Order, ¶ 1. This

Commission's ruling contravenes this fundamental goal of the Act and, as noted by the PUCO, may serve to further expand with CLECs some of the very problems the Act was intended to resolve with respect to ILECs. See PUCO Petition, p. 6. This Commission's ruling provides CLEC's with a sword to strike down those pro-competitive obligations which a State might opt to impose if those obligations fall within the umbrella of the pro-competitive duties congress imposed on ILECs under section 251(c). Such a result was not intended by the Act. As the Texas PUC explained, it already has a CLEC which is providing substantially all of the local loop facilities to a particular new subdivision. Texas PUC Petition, pp. 14-15. The Commission's ruling severely restricts if not effectively eliminates the ability of residents in that subdivision to be served by any other carrier. The ICC would expect similar situations to develop in Illinois and other States.

The ICC also agrees with the Texas PUC that the section 251(h) option is neither appropriate nor adequate. See Texas PUC Petition, pp. 16-17. It is entirely conceivable that imposing some of the obligations contained in section 251(c) on CLECs would further the development of competition, while imposing all of the obligations contained in section 251(c) on CLECs would impede competition. Congress could not have intended that CLECs must be subject to all the obligations contained in section 251(c) or none at all. Yet, this Commission's decision results in such a "two-sizes fit all" interpretation of the Act. If nothing else, this

Commission should modify its ruling to retract its blanket prohibition and specify that it will engage in a case by case analysis of State actions to impose section 251(c) type obligations on CLECs.

The Commission's explanation of its ruling on this issue in the First Report And Order is very brief. The ICC respectfully submits that the Commission's ruling was in error. It appears that the sole basis for the Commission's decision is the fact that Congress provided a statutory basis for treating CLECs as ILECs. It does not follow from the fact that Congress provided a statutory basis for treating certain CLECs as ILECs, that it would be inconsistent with the Act for States to impose on CLECs any of the obligations Congress imposed on ILECs.

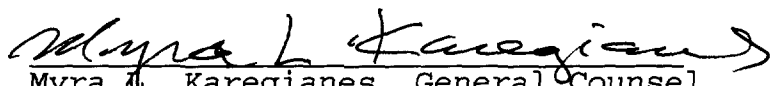
There is nothing in the language used in sections 251(a), 251(b) and 251(c) to suggest that the duties listed are limitations on the duties which may be imposed. To the contrary, Congress stated the duties listed in the affirmative (e.g., each incumbent local exchange carrier has the following duties) and did not use words of limitation (e.g., only incumbent local exchange carriers shall have the following duties). Moreover, section 251(h) (2) does not contain any language indicating it is the exclusive means by which CLECs may be made subject to any of the duties contained in section 251(c). If that had been Congress' intent, it could have easily provided that "non-incumbent LECs may be subjected to the

duties contained in section 251(c) only if the Commission determines, by rule, to provide" Given the explicit reservation of State authority, there is no basis for concluding that Congress' establishment of varying duties for carriers, LECs and ILECs was intended to operate as a limitation on the types of duties which States may place on those carriers. Simply put, Congress did not intend to establish "competitive speed limits".

WHEREFORE, the ICC respectfully requests that this Commission grant the requests by the PUCO and the Texas PUC for the Commission to reconsider its conclusion regarding the ability of states to impose additional obligations on non-incumbent local exchange carriers.

Respectfully submitted,

Illinois Commerce Commission


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